Southern California Edison Company *and* International Brotherhood of Electrical Workers, Local No. 47, AFL–CIO, CLC. Case 21–CA–28018

July 20, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On February 5, 1992, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Southern California Edison Company, Rosemead, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

James D. Williams and *Peter Tovar, Esqs.*, for the General Counsel.
Gregory L. Wallace, Esq., of Rosemead, California, for the Respondent.
Hank Colt, Business Representative, of Diamond Bar, California, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. I heard this matter in Los Angeles, California, on October 22, 1991.

The complaint arose from a charge[1] filed by International Brotherhood of Electrical Workers, Local No. 47, AFL–CIO, CFL (Union).[2] It issued on June 5, 1991, and alleges in substance that Southern California Edison Company (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) on and after December 7, 1990, by ceasing to use its employee Gary Ray as an acting foreman because of his protected grievance activities.[3]

II. THE ALLEGED MISCONDUCT

A. *Evidence*

Respondent demoted Ray from electrical crew foreman to lineman/splicer on September 4, 1990. He had been a foreman since June 1986.

Ray's demotion notwithstanding, Respondent ungraded him to acting foreman a number of times, totaling 149.5 hours, between September 10 and November 28, 1990. The prevailing labor contract provided that, when a regular foreman was absent, he was to be replaced by the most senior crewman ''with the ability and qualifications.''

Meanwhile, on September 18, the Union orally grieved Ray's demotion pursuant to the contractually prescribed procedure. Respondent adhered to its position, prompting the Union to put the grievance in writing on about October 1, again in keeping with the contractual procedure. That led to a factfinding meeting on December 7, during which the Union's shop steward, Toby Jarvis, contended that the demotion was ''not fair'' given Respondent's laxity toward other foremen. Ron Ferree, Respondent's acting district manager, replied that Ray was demoted out of a concern that he ''could possibly injure himself or other persons on the crew.''

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In adopting the judge's findings, including his credibility resolutions, we find it unnecessary to rely on his finding in the last four lines of the third paragraph in sec. II,B of his decision that Leffingwell had contradicted himself in testifying.

The Respondent excepted to the failure of the General Counsel to prove that union animus motivated it to stop upgrading employee Ray, and the judge's statement that animus, in the present circumstances, is beside the point. We find that the credited evidence established a prima facie case including animus derived, inter alia, from the fact that Respondent took the action it did because of the Union's argument in support of its grievance. The Respondent did not rebut that showing by adducing credible evidence that it acted only for lawful reasons. In particular, the Respondent has not shown by credible evidence that Ray was in fact unsafe as foreman when the Respondent announced at the grievance meeting that it was not going to upgrade Ray from that point on. Indeed, the Respondent's upgrading Ray to acting foreman on a number of occasions totaling 149.5 hours from September 10 to November 28, 1990, belies that Ray was not safe on December 7, 9 days later. This, when considered together with the judge's discrediting of the supervisors' testimony that an undocumented decision no longer to upgrade Ray was made at the end of November, leads us to the conclusion that the reasons offered by the Respondent for its decision announced at the grievance meeting—that Ray was unsafe—was pretextual. We conclude that the real reason was Ray's filing and pursuit of the grievance, a protected, concerted activity. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

[1] The charge was filed on April 22, 1991.

[2] Amended to reflect that the Union is affiliated with the Canadian Federation of Labour (CFL) rather than the Canadian Labour Congress (CLC).

[3] The parties agree and I find that Respondent is an employer engaged in and affecting commerce within Sec. 2(2), (6), and (7) of the Act, and that the Union is a labor organization within Sec. 2(5).

Jarvis then questioned why, ''if safety was the issue,'' Respondent had seen fit to upgrade Ray to acting foreman ''for a great deal of time commencing approximately a week after his demotion from . . . fulltime foreman.'' Wesley Van Hofwegen, a union business representative, echoed Jarvis, noting that the upgrades indicated that Respondent must have considered Ray of foreman caliber in light of the ability-and-qualifications language in the contract.

Either Ferree or Ron Rust, operations supervisor, answered that Respondent had been ungrading Ray to give him ''an opportunity to improve his performance'' as foreman, in the hope that he might eventually be restored to his former position. Ferree or Rust added that the Union was being ''unfair'' to use the upgrades to attack the demotion, inasmuch as Respondent was ''only trying to help'' Ray.

John Leffingwell, Respondent's industrial relations representative, presently called for a caucus, during which he stated variously, as recalled by Ferree: ''They're right''; ''the guy is not safe to run a crew, and yet you guys are continuing to upgrade him''; and ''I think we need to admit that . . . a mistake was made.''

When the meeting resumed, Ferree stated that the Union had ''made a good point'' and announced that Respondent was ''not going to upgrade Mr. Ray . . . from that point on.'' Van Hofwegen protested that the Union was grieving Ray's demotion, not the upgrades, and that Respondent ''would be talking to'' the NLRB if it stopped the upgrades. Leffingwell rejoined, ''You've got to do what you've got to do,'' and the meeting ended on that unhappy note.

Operations Manager Bill Douglas told Ray later on the December 7 that Respondent ''was no longer going to upgrade'' him, but perhaps would resume the practice in 6 months.

Respondent thereafter excluded Ray from its pool of upgrade candidates until September 1991, when it restored his eligibility. Those serving as foremen receive a somewhat higher wage under the contract than do journeyman lineman/splicers.

The only testimonial conflict regarding the December 7 meeting concerns Leffingwell's comments immediately before the caucus. Jarvis testified that Leffingwell evinced surprise that Respondent had been upgrading Ray since the demotion, exclaiming to Ferree and Rust: ''Is that right? Are we upgrading him now?'' Ferree denied that Leffingwell said this, testifying that Leffingwell had learned of the upgrades during management's ''pre-huddle'' before the meeting. Ferree continued that this ''disappointed'' Leffingwell, who feared that it would ''water down our position'' regarding the validity of the demotion. Leffingwell, while not directly disputing Jarvis' account, likewise testified that he learned about the upgrades during the prehuddle. Leffingwell recounted that this ''surprised'' him, and that he voiced his concern ''that it wasn't proper.'' He elaborated: ''I was kind of . . . ranting and raving and screaming.''

Respondent would have it that its decision to stop Ray's upgrades was reached before and uninfluenced by the December 7 meeting. Thus, Ferree testified that he, Rust, and Douglas had decided ''towards the end of November'' to take that action because of ''a lack of performance.'' Rust, too, testified that such a decision had been made—''around the 28th or 29th'' of November; and Leffingwell testified that Ferree and Rust told him of the decision about when it was made. He qualified: ''I think it was communicated to me . . . . I believe it was after the 28th.''

Respondent admittedly has no documentation of such a decision and never informed Ray of it. Nor did it tell the Union about it during the December 7 meeting. Leffingwell, attempting to explain, testified: ''We go in with an open mind . . . . Had the Union convinced us that our discipline . . . was incorrect, then it probably would have been a moot point.''

Respondent seems to further contend, in its brief, that it stopped upgrading Ray lest someone grieve its noncompliance with the ability-and-qualifications language in the contract. It concededly never expressed this concern to the Union, however, and the record otherwise is devoid of evidence that this was a factor.

B. *Discussion*

An employee's grievance activity pursuant to a labor contract and/or with the assistance of a union is protected by the Act. E.g., *NLRB v. City Disposal Systems*, 465 U.S. 823, 836, 840–841 (1984); *Schnuck Markets*, 303 NLRB 256 (1991); *Syn-Tech Windows Systems*, 294 NLRB 791 (1989); *Unico Replacement Parts*, 281 NLRB 309 (1986); *Aladdin Hotel & Casino*, 273 NLRB 270 (1984); *Champion Parts Rebuilders*, 260 NLRB 454 (1982); *Victor Otlans Roofing Co.*, 182 NLRB 898 (1970).

Taking the analytical approach prescribed by the Board in *Wright Line*,[4] I conclude that the General Counsel has made the requisite prima facie showing that Respondent stopped upgrading Ray because of his protected grievance activity. The basis for this conclusion, simply, is that Respondent announced the stoppage during the December 7 grievance meeting, in reaction to union arguments attacking Ray's demotion. I reject Respondent's contention that the prosecution fails for want of a showing that the conduct in question was fueled by union animus. Animus, in the present circumstances, ''is beside the point.'' *Unico Replacement Parts*, supra at 315.

I further conclude that Respondent has not overcome the prima facie showing. So doing, I refuse to believe Respondent's witnesses that the decision to stop Ray's upgrades was reached before and uninfluenced by the December 7 meeting. Apart from the tentative and generally unpersuasive demeanor of Ferree, Rust, and Leffingwell while testifying about this would-be decision, the surrounding circumstances betray fabrication. Not only was such a decision neither undocumented nor communicated to Ray or the Union, but Leffingwell contradicted himself by testifying at one point that he had been advised of it several days before, and else-

[4] In *Wright Line*, 251 NLRB 1083 (1980), the Board stated at 1089:

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

where that he was highly upset on being told, during or just before the December 7 meeting, that Ray had been receiving upgrades since his demotion.[5]

I conclude, in sum, that Respondent violated Section 8(a)(1) and (3) as alleged by stopping Ray's upgrades on December 7, 1990.[6]

CONCLUSION OF LAW

Respondent violated Section 8(a)(1) and (3) of the Act on and after December 7, 1990, by ceasing to upgrade Ray to acting foreman.

REMEDY

I shall include in my recommended Order provisions that Respondent cease and desist from the unfair labor practices found herein, and that it take certain affirmative action to effectuate the policies of the Act. With regard to the latter, I will not specify that Respondent restore Ray to eligibility for upgrades, inasmuch as that already has occurred. Backpay shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as dictated in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Southern California Edison Company, Rosemead, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against employees for engaging in grievance activities protected by the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights protected by the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Gary Ray whole with interest for earnings lost as a result of Respondent's refusal to assign him foreman upgrades as of December 7, 1990, as outlined in the remedy section of this decision.

(b) Remove from its files and destroy any and all references to its unlawful removal of Ray from the pool of employees eligible for foreman upgrades; and notify him in writing that this has been done and that that unlawful action will in no way serve as a ground for future personnel or disciplinary action against him.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or helpful to determine the amounts of backpay owing under the terms of this Order.

(d) Post at its Central Orange County District facility, Orange County, California, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] And, even if I were to credit Respondent's witnesses in this regard, Leffingwell's admission that Respondent still had ''an open mind'' when entering the December 7 meeting would show that the decision was not final.

[6] I deem it irrelevant, in the circumstances of this case, whether Ray in fact possessed the ''ability and qualifications'' contemplated by the contract. See *Victor Otlans Roofing Co.*, supra at 182 NLRB 901.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminate against employees for engaging in grievance activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights protected by the Act.

WE WILL make Gary Ray whole with interest for earnings lost as a result of our refusal to assign him foreman upgrades as of December 7, 1990.

WE WILL remove from our files and destroy any and all references to our unlawful removal of Ray from the pool of employees eligible for foreman upgrades; and WE WILL notify him in writing that this has been done and that that unlawful action will in no way serve as a ground for future personnel or disciplinary action against him.

SOUTHERN CALIFORNIA EDISON COMPANY